No. 83-5966

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WENDELL BYRON DIXON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The
Appellate Court Of Illinois, First Judicial District

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether petitioner's failure to make a record of the voir dire proceedings in the trial court precludes review of his claim that respondents exercised their peremptory challenges in a racially discriminatory manner?

Whether this Court lacks jurisdiction to review the question presented by petitioner since the court below declined to consider the merits of that question, but instead ruled on state procedural grounds?

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OPINION BELOW

Following a jury trial in the Circuit Court of Cook County, Illinois, petitioner was convicted of two counts of murder. On direct appeal to the Appellate Court of Illinois, First District, the conviction was affirmed. The decision in People v. Dixon is reported at 105 Ill. App. 3d 340, 434 N.E.2d 369, and a copy is attached to the petition. Leave to appeal to the Illinois Supreme Court was denied.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). However, as discussed more fully below, this Court lacks jurisdiction to entertain the question presented by petitioner, since the court below did not reach the merits but instead decided the case on the basis of a state procedural ground.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF FACTS

The facts pertaining to the crime committed by petitioner are adequately set forth in the opinion of the court below. Since they do not bear directly on the questions presented, they need not be restated here.

The facts pertaining to petitioner's claim are also set forth in the opinion of the court below. (See, 105 Ill. App. 3d at 345-346) They are discussed in the argument portion, infra.

REASONS FOR DENYING THE WRIT

I.

THE ABSENCE OF A RECORD OF THE VOIR DIRE PROCEEDINGS PRECLUDES REVIEW OF PETITIONER'S ALLEGATION THAT THE PROSECUTOR EXERCISED HIS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER.

Petitioner, a black man, alleges that he was denied his right under the Sixth Amendment, as applied to the states through the Fourteenth Amendment, to a trial by a jury fairly representative of a cross-section of the community. Taylor v. Louisiana, 419 U.S. 522 (1975). He contends that in selecting the jury which was to hear the case, the prosecutor used his peremptory challenges to exclude blacks solely on the basis of race, thus producing an all-white jury, and that this, coupled with the number of prior Illinois cases in which the same allegation was made, satisfies the standard announced in Swain v. Alabama, 380 U.S. 202 (1965) for finding systemmatic exclusion of minorities from juries.

No record was made in this case of the voir dire proceedings. Neither a bystander's report nor an agreed statement of facts was prepared,*/ or even attempted. The only available record is the motion for a mistrial made by defense counsel after the jury was selected, and the oral representations made at the hearing on the motion. It was alleged that out of the 8 blacks on the venire, the prosecutor excused 5 of them with peremptory challenges. The trial court recalled that only 4 were excused. 105 Ill. App. 3d at 346. Aside from the fact that the record relied on by petitioner is not undisputed, it is silent as to the questions posed during voir dire and the responses of the veniremen. Thus, the

*/ The procedure for preparing one of those two alternatives to a transcript is set forth in Illinois Supreme Court Rules 323(c) and (d) [Ill. Rev. Stat. 1981, ch. 110A, par. 323(c), (d)], made applicable to criminal cases by Rule 612(c) [Ill. Rev. Stat. 1981, ch. 110A, par. 612(c)]. The procedure calls for preparation of a proposed report of proceedings, to be certified as accurate by the trial court or stipulated to be the parties.

arguments presented in the petition in support of granting certiorari rest on an assumption that is entirely hypothetical: that nothing but race could have motivated the prosecutor's use of his peremptory challenges. That assumption is quite without support in the present record.

The familiar maxim that the law arises out of fact, though well-worn to the point of being hackneyed, expresses a fundamental precept of this Court's exercise of its extraordinary jurisdiction, embodied in the rule that federal questions not apparent from the record may not be decided. Wolfe v. North Carolina, 364 U.S. 177 (1960). Petitioner alleges that the prosecutor excused blacks from the jury solely because of their race. Five members of this Court have very recently expressed their opinion that "whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group" is an important constitutional question. McCray v. New York, Miller v. Illinois, Perry v. Louisiana, ____ U.S. ____, 77 L.Ed. 1322 (1983) (opinion of Justice Stevens, joined by Justices Blackman and Powell, respecting the denial of certiorari; opinion of Justice Marshall, joined by Justice Brennan, dissenting from the denial of certiorari). It should not be decided in a factual vacuum. Because that question is simply not presented on the record of this case, certiorari should be denied.

II.

BECAUSE THE COURT BELOW DECLINED TO CONSIDER THE MERITS OF THE QUESTION PRESENTED BY PETITIONER, BUT INSTEAD RULED ON STATE PROCEDURAL GROUNDS, THIS COURT LACKS JURISDICTION.

Under Illinois law, it is the defendant's burden to preserve the record of proceedings in the trial court, or, failing that, to have a bystander's report certified. Illinois appellate courts will not review allegations of error based on a silent or inadequate record. People v. Edwards, 74 Ill.2d 1,

383 N.E.2d 944 (1978), cert. denied, 425 U.S. 931 (1979); People v. Smith, 42 Ill.2d 479, 248 N.E.2d 68 (1969).

As a matter of state law and state court procedure, the court below found the argument presented by respondents in part I of this brief to be persuasive, and made it the holding of the case:

> ... a consideration of defendant's challenge to the composition of his jury cannot be made in the absence of an adequate record of the voir dire. For without an adequate record there is nothing to review.

105 Ill. App. 3d at 346.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). A prerequisite to the exercise of that jurisdiction is a ruling by the state court on the merits of the question presented. Without it, this Court lacks jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969). Because the court below never reached the question presented in the petition, due to the inadequacy of the record, certiorari should be denied.

C O N C L U S I O N

For all the foregoing reasons, respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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March 13, 1984

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CERTIFICATE OF SERVICE AND
STATEMENT OF TIMELY FILING

I, Mark L. Rotert, a member of the bar of this Court and representing Respondents in this cause, certify:

1.) That I have served ten (10) copies of the Respondents' Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 160 North LaSalle Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Alexander Stevas, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served.

I further state that this mailing took place on March 13, 1984, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: Mark L. Rotert
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SUBSCRIBED and SWORN to
before me this 13th day of
March, 1984.

Notary Public
NOTARY PUBLIC